YONG TECK LEE & ANOR v. AMARJIT SINGH

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
WONG SIONG TUNG JC
[ORIGINATING SUMMONS NO: BKI-24-99-10-2019]
11 MAY 2020

CIVIL PROCEDURE: *Action – Withdrawal – Whether party to bear own costs – Whether withdrawal of action could be safely equated with defeat or acknowledgment of likely defeat – Whether action plainly and obviously unsustainable – Whether justified for plaintiffs to be ordered to pay defendant costs of action – Whether unjust to penalise plaintiffs to pay costs of action – Whether each party ought to bear own costs*

CIVIL PROCEDURE: *Costs – Withdrawal of action – Whether party to bear own costs – Whether withdrawal of action could be safely equated with defeat or acknowledgment of likely defeat – Whether action plainly and obviously unsustainable – Whether justified for plaintiffs to be ordered to pay defendant costs of action – Whether unjust to penalise plaintiffs to pay costs of action – Whether each party ought to bear own costs*

The defendant was appointed by the Public Service Commission as the Director of Sabah Water Department on 10 August 2018 upon a three-year contract. On 9 October 2019, in an action commenced by the plaintiffs against the defendant and the State Government of Sabah in the High Court, the court granted the plaintiffs a declaration that the defendant's said appointment by the State Government of Sabah contravened s. 3 of the Sabah Water Supply Enactment 2003, because the defendant was not from amongst the members of the State Public Service at the time of his appointment. On 21 October 2019, the plaintiffs commenced the action herein against the defendant seeking injunctions to restrain the defendant from exercising the powers of the Director of Sabah State Water Department and also to restrain the defendant from entering into the premises, offices and/or branches of Sabah State Water Department in the capacity of the Director of Sabah State Water Department. In the affidavit in opposition affirmed by the defendant on 21 November 2019, it was revealed that following the said court's declaration on 9 October 2019, and on 11 October 2019, the defendant was appointed as a technical adviser based in the State Secretary's Office, Chief Minister Department. It was also revealed that on 14 October 2019, the defendant was transferred from the State Secretary's Office to the Sabah State Water Department to carry on duties as the Director by way of contract. Thereafter, the plaintiff filed and served an affidavit in reply and the defendant also filed and served his affidavit in further reply. When the plaintiffs' action was called for hearing on 21 January 2020, the plaintiffs applied to withdraw the action as the matter had become academic in view

of the new appointment of the defendant. The defendant had no objection to the withdrawal but applied for an order that the plaintiffs pay the defendant costs of this action. The plaintiffs, on the other hand, contended that each party shall bear their own costs in the circumstances and that this action was public interest litigation. It was for this court to determine whether taking into consideration the whole circumstances and situation, the discontinuance or withdrawal of the action by the plaintiff could safely be equated with defeat or an acknowledgment of likely defeat so as to justify that the plaintiffs be ordered to pay the defendant costs of the action.

Held (granting plaintiffs leave to withdraw or discontinue action; each party shall bear their own costs):

(1) The court had declared the appointment of the defendant to be clearly in contravention of s. 3 of the Sabah Water Supply Enactment, but the defendant continued to act as the Director of Sabah State Water Department. It was a difficult proposition to swallow that an act declared to be contravening the law was still legal and lawful and means nothing. It was reasonable for any law-abiding citizen to feel disturbed. In the circumstances, it was not unreasonable for the plaintiffs as the procurer of the court's declaration in the previous action to commence the action herein on 21 October 2019. (paras 30-32)

(2) It was after the plaintiffs commenced the action on 21 October 2019 that the Sabah State Public Service Commission issued a letter dated 30 October 2019 to the defendant and appointed him as a technical adviser based in the State Secretary's Office with retrospective effect to 11 October 2019. The defendant was immediately transferred to Sabah State Water Department to carry on duties as the director. It was difficult not to believe that such moves were not in response to counter the plaintiffs' action herein as commenced. The result was that thenceforth, the defendant was acting under a new appointment. (paras 34-37)

(3) The new appointment of the defendant removed or changed the subject of the disputes in the action which was based on the previous appointment of the defendant declared earlier by the court to be in contravention of s. 3 of the Sabah Water Supply Enactment. Any issues of the impropriety of the defendant continuing to act and exercise the power as the director under the previous appointment became non-issues. The basis of the plaintiffs' actions to restrain the defendant from continuing to act and exercise power as the director under the previous appointment and any cause of action in remedial thereto had been removed by the new appointment. (paras 38 & 40)

(4) There was no undue or unreasonable delay on the part of the plaintiffs to convey to the defendant's solicitors the plaintiffs' decision to withdraw or discontinue the action herein, which was before the said scheduled hearing date. Obviously, the defendant had no wish also for the action to proceed to full hearing or trial and thus, required the plaintiffs to withdraw and discontinue the action. Further, the defendant failed to persuade this court that the plaintiffs' action was so plainly and obviously unsustainable and was certain to fail. (paras 44, 45 & 49)

(5) Having regards to the whole circumstances and situation particularly the change of events by the new appointment of the defendant brought about after the plaintiffs commenced the action herein which rendered the action academic, the decision by the plaintiffs to withdraw or discontinue the action could not safely be equated with defeat or an acknowledgment of likely defeat of the plaintiffs' action. Further, the plaintiff appeared to have commenced the action herein for public interest that the law is adhered to. It was unfair and unjust to penalise the plaintiffs to pay costs of the action. (paras 54-56)

Case(s) referred to:

Australian Securities Commission v. Aust-Home Investments Ltd (1993) 116 ALR 523 ***(refd)***

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***

Barretts & Baird (Wholesale) Ltd v. Institution of Professional Civil Servants [1987] IRLR 3 ***(refd)***

Hongkong & Shanghai Banking Corp v. Timor Electric Cable & Wire Sdn Bhd & Ors [1991] 3 CLJ 1794; [1991] 2 CLJ (Rep) 728 HC ***(refd)***

In Re Walker Wingsail Systems plc; Walker v. Walker [2005] EWCA Civ 247 ***(refd)***

JT Stratford & Son Ltd v. Lindley & Ors (No 2) [1969] 3 All ER 1122 ***(refd)***

Lin Securities (Pte) (in liquidation) v. Assignee (Malaysia) of the Estate of Tan Koon Swan, a Bankrupt and Another [1992] 2 SLR (R) 519 ***(refd)***

One.Tel Ltd v. Deputy Commissioner of Taxation (2000) 171 ALR 227 ***(refd)***

Pengarah Tanah dan Galian Negeri Pulau Pinang & Anor v. Ann Joo Steel Sdn Bhd & Another Appeal [2018] 4 CLJ 171 CA ***(refd)***

Re Minister for Immigration and Ethnic Affairs; Ex parte Lai Qin [1997] 143 ALR 1 ***(refd)***

Sabil Mulia (M) Sdn Bhd v. Pengarah Hospital Tengku Ampuan Rahimah & Ors [2005] 2 CLJ 122 CA ***(refd)***

Tan Kim Hai & Sons Enterprises Sdn Bhd & Ors v. Tam Kim San & Sons Sdn Bhd & Ors; Hiap Lee (Choong Leong & Sons) Brickmakers Sdn Bhd & Anor (Interveners) [1996] 2 BLJ 502 HC ***(refd)***

Legislation referred to:

Government Proceedings Act 1956, s. 29(2)
Rules of Court 2012, O. 59 r. 3(2)
Sabah Water Supply Enactment 2003, ss. 3, 66

Other source(s) referred to:

Malaysian Civil Procedure 2018, vol 1, p 796, paras 59/3/2

A *For the plaintiffs - Yong Yit Yee & Darren Punai; M/s Yong & Punai Chambers*
For the defendant - Christopher Chong; M/s Lind Willie Wong & Chin

Reported by Suhainah Wahiduddin

JUDGMENT

B **Wong Siong Tung JC:**

Brief Background

[1] The defendant was appointed by the Public Service Commission as the Director of Sabah Water Department on 10 August 2018 upon a three-year C contract.

[2] On 9 October 2019, in an action commenced by the plaintiffs against the defendant and the State Government of Sabah in the High Court in Originating Summons No: BKI-24-27/3-2019, the court granted the plaintiffs a declaration that the defendant's said appointment by the State D Government of Sabah contravened s. 3 of the Sabah Water Supply Enactment 2003. This is because the defendant was not from amongst the members of the State Public Service at the time of his appointment.

[3] On 21 October 2019, the plaintiffs commenced the action herein against the defendant seeking injunctions to restrain the defendant from E exercising the powers of the Director of Sabah State Water Department and also to restrain the defendant from entering into the premises, offices and/or branches of Sabah State Water Department in the capacity of the Director of Sabah State Water Department mainly on the basis that the defendant's said appointment contravened s. 3 of the Sabah Water Supply Enactment F 2003 as declared by the court earlier.

[4] In the affidavit in opposition affirmed by the defendant on 21 November 2019 (encl. 2) filed herein, it was revealed then that following the said court's declaration on 9 October 2019, and on 11 October 2019, the defendant was appointed as a Technical Adviser based in the State G Secretary's Office, Chief Minister Department. It was also revealed that on 14 October 2019, the defendant was transferred from the State Secretary's Office to the Sabah State Water Department to carry on duties as the Director by way of contract.

H **[5]** Thereafter, the plaintiffs filed and served an affidavit in reply (encl. 13) and the defendant also filed and served his affidavit in further reply (encl. 16).

[6] When the plaintiffs' action was called for hearing on 21 January 2020, the plaintiffs applied to withdraw the action as the matter has become I academic in view of the new appointment of the defendant.

[7] The defendant has no objection to the withdrawal but applied for an order that the plaintiffs pay the defendant costs of this action.

[8] The plaintiffs on the other hand, contended that each party shall bear their own costs in the circumstances and that this action is public interest litigation.

[9] Parties are then directed to make submissions on the issues relating to costs of the action and also to consider the applicability of the principles of law as propounded in *Hongkong & Shanghai Banking Corp v. Timor Electric Cable & Wire Sdn Bhd & Ors* [1991] 3 CLJ 1794; [1991] 2 CLJ (Rep) 728; [1992] 1 MLJ 779; *Tan Kim Hai & Sons Enterprises Sdn Bhd & Ors v. Tam Kim San & Sons Sdn Bhd & Ors; Hiap Lee (Choong Leong & Sons) Brickmakers Sdn Bhd & Anor (Interveners)* [1996] 2 BLJ 502; [1996] 5 MLJ 593 and *J.T. Stratford & Son Ltd v. Lindley & Ors (No. 2)* [1969] 3 All ER 1122 which they did.

Principles Of Law In The Exercise Of Discretionary Power To Order Costs

[10] The power to order payment by one party to another party of any costs of or incidental to any proceedings is in the discretion of the court. Under O. 59 r. 3(2) of the Rules of Court 2012, as a general rule, costs ordered to be paid should follow event.

[11] That means the successful party is *prima facie* entitled to his or her costs except when the circumstances are such as to warrant a departure from the general rule. *Malaysian Civil Procedure 2018*, vol. 1, para. 59/3/2 to 59/3/2, p. 796.

[12] Thus, by the general rule, success in the action or in a particular issue in a proceeding is the main factor ordinarily that detects the exercise of the court discretion. Success in the action depends on the merits of the case of the parties.

[13] However, when merits of the case were not adjudicated by the court for some reasons such as a plaintiff has decided to withdraw or discontinue his/her claim in the action before trial or full hearing, there is an absence of this success factor for the application of the general rule.

[14] In *JT Stratford & Son Ltd v. Lindley & Ors (No. 2)* [1969] 3 All ER 1122, after successfully obtained an interim injunction, the plaintiffs did not proceed with the action. The defendants took out an application to dismiss the action for want of prosecution and asked for all costs to be paid by the plaintiffs whereas, the plaintiffs applied for leave to discontinue the action with an order requiring the defendants to pay costs.

[15] The English Court of Appeal refused to go into the question whether if the action had been tried on its merits, the plaintiff would probably win the action so as to award costs to the plaintiff as urged by counsel for the

plaintiffs. In that case, both the plaintiff and the defendant simply did not wish to proceed with the action. In the circumstances, the court gave leave to the plaintiffs to discontinue the action and order each party to bear their own costs.

[16] In *Hongkong & Shanghai Banking Corp v. Timor Electric Cable & Wire Sdn Bhd & Ors* [1991] 3 CLJ 1794; [1991] 2 CLJ (Rep) 728; [1992] 1 MLJ 779, the plaintiff commenced action to recover various sums from the first defendant as the principal debtor and six other defendants as the guarantor in respect of banking facilities. The fifth defendant filed his defence. Judgment in default was entered against the first and seventh defendants for the sums claimed. The judgment debt was fully settled by the other defendants against whom the action was discontinued except the fifth defendant. The fifth defendant also filed an application to dismiss the plaintiff's action for want of prosecution and costs and whereas the plaintiff also applied for leave to discontinue the action against the fifth defendant and for costs of the application.

[17] The fifth defendant in that case also contended on the strength of his defence in attempting to show that the plaintiff's case lacked merit.

[18] The court held that it would be a waste of time to try the applications on its merits merely for the sake of the question of costs and thus refused to go into the merits. Following *JT Stratford & Son Ltd v. Lindley & Ors (No. 2)* [1969] 3 All ER 1122, the court granted plaintiff leave to discontinue the action against the fifth defendant with each party to pay its own costs. In that case, the action was not proceeded to trial because the action has become academic due to the settlement of the judgment debt by the other defendants.

[19] Thus, the court will not delve into the merits of the case of the parties to hypothetically determine the outcome of the action for deciding who should bear the costs.

[20] When there is no hearing on the merits because a plaintiff withdraws or discontinues the action, ordinarily a defendant is entitled to be paid costs by the plaintiff because such withdrawal or discontinuance of the action is generally treated as a defeat, or acknowledgement of defeat or a likely defeat of the plaintiff's action. See: *Lin Securities (Pte) (in liquidation) v. Assignee (Malaysia) of the Estate of Tan Koon Swan, a Bankrupt and Another* [1992] 2 SLR (R) 519 and *In Re Walker Wingsail Systems plc; Walker v. Walker* [2005] EWCA Civ 247.

[21] The court has to look at the whole situation to see whether such discontinuance or withdrawal of the action can safely be equated with defeat or an acknowledgement of likely defeat. See: *Barretts & Baird (Wholesale) Ltd v. Institution of Professional Civil Servants* [1987] IRLR 3.

[22] In *Tan Kim Hai & Sons Enterprises Sdn Bhd & Ors v. Tam Kim San & Sons Sdn Bhd & Ors; Hiap Lee (Choong Leong & Sons) Brickmakers Sdn Bhd & Anor (Interveners)* [1996] 2 BLJ 502; [1996] 5 MLJ 593, the plaintiffs commenced action against defendants for breach of agreement relating to sale of shares in a Malaysian company and also in a Singapore company. After obtaining interim injunction against the defendants restraining dealings in the lands and shares in Malaysian company, the plaintiffs reached a settlement with the defendants in a court proceeding in Singapore whereby consent judgment was recorded by which the plaintiffs achieved the reliefs that the plaintiffs had sought for in the action. The plaintiffs therefore sought to discontinue the action. The issue is whether the plaintiffs should be ordered to pay costs of the action.

[23] Following *Barretts & Baird (Wholesale) Ltd v. Institution of Professional Civil Servants* [1987] IRLR 3, the court held that mere discontinuance or withdrawal of action by reason of the action becoming academic cannot be equated with defeat or an acknowledgement of likely defeat. In that case, the action was not proceeded to trial because the action became unnecessary because of the settlement that the plaintiffs reached with the defendants in Singapore for which the plaintiffs achieved all the reliefs sought for in the action.

[24] In *One.Tel Ltd. v. Deputy Commissioner of Taxation* (2000) 171 ALR 227, Burchett J of the Federal Court of Australia, New South Wales said at para. 6 that:

> [6] In my opinion, *it is important to draw a distinction between cases in which one party, after litigating for some time, effectively surrenders to the other, and cases where some supervening event or settlement so removes or modifies the subject of the dispute* that, although it could not be said that one side has simply won, no issue remains between the parties except that of costs. In the former type of case, there will commonly be lacking any basis for an exercise of the court's discretion otherwise than by an award of costs to the successful party. *It is the latter type of case which more often creates problems, since there may be difficulty in discerning a clear reason why one party, rather than the other, should bear the costs.* (emphasis added)

[25] In *Re Minister for Immigration and Ethnic Affairs; Ex parte Lai Qin* [1997] 143 ALR 1, Justice Hugh J stated at pp. 3 to 4 that:

> In an appropriate case, a court will make an order for cost even when there has been no hearing on the merits and the moving party no longer wishes to proceed with the action. The court cannot try a hypothetical action between the parties. To do would burden the parties with the costs of a litigation action which by settlement or extra-curial action they had avoided. In some cases, however, the court may be able to conclude that one of the parties has acted so unreasonably that the other party should obtain the costs of the action. In administrative law matters, for example,

it may appear that the Defendant has acted unreasonably in exercising or refusing to exercise a power and that the Plaintiff had no reasonable alternative but to commence a litigation. Thus, for example, in *R v. Gold Coast City Council; Ex parte Raysun Pty Ltd*, the Full Court of the Supreme Court of Queensland gave a prosecutor seeking *mandamus* the costs of proceedings up to the date when the respondent council notified the prosecutor that it would give the prosecutor relief that it sought. The Full Court said that the prosecutor had reasonable ground for complaint in respect of the attitude taken by the respondent in failing to consider the application by the prosecutor for approval of road and drainage plan.

Moreover, in some cases a judge may feel confident that, although both parties have acted reasonably, one party was almost certain to have succeeded if the matter had fully tried. This is perhaps the best explanation of the unreported decision of Pincus J in *South East Queensland Electricity Board v. Australian Telecommunications Commission* where his Honour ordered the respondent to pay 80% of the applicant's taxed costs even though his Honour found that both parties had acted reasonably in respect of the litigation. But such cases are likely to be rare.

If it appears that both parties have acted reasonably in commencing and defending the proceedings and the conduct of the parties continued to be reasonable until the litigation was settled or its further prosecution became futile, the proper exercise of the cost discretion will usually mean that the court will make no order as to the cost of the proceedings. This approach has been adopted in a large number of cases.

[26] In *Australian Securities Commission v. Aust-Home Investments Ltd* (1993) 116 ALR 523, after reviewing several decided cases including *J.T. Stratford & Son Ltd v. Lindley & Ors (No. 2)* [1969] 3 All ER 1122, Hill J of the Federal Court of Australia, Queensland stated at p. 530 that:

These cases seem to me to support the following propositions being made.

(1) Where neither party desires to proceed with litigation the court should be ready to facilitate the conclusion of the proceedings by making a cost order: *Stratford* and the *SEQEB* case.

(2) It will rarely, if ever, be appropriate, where there has been no trial on the merits, for a court determining how the costs of the proceeding should be borne to endeavour to determine for itself the case on the merits or, as it might be put, to determine the outcome of a hypothetical trial: *Stratford supra*. This will particularly be the case where a trial on the merits would involve complex factual matters where credit could be an issue.

(3) In determining the question of costs, it would be appropriate, however, for the court to determine whether the applicant acted reasonably in commencing the proceedings and whether the respondent acted reasonably in defending them (*SEQEB, supra*).

(4) In a particular case it might be appropriate for the court in its discretion to consider the conduct of a respondent prior to the commencement of the proceedings where such conduct may have precipitated the litigation: *cf Sunday Times Newspaper Co Ltd v. McIntosh* (1933) 33 SR (NSW) 371.

(5) Where the proceedings terminate after interlocutory relief has been granted, the court may take into account the fact that that interlocutory relief has been granted: *cf Re Asiatic Electric Co Pty Ltd (in liq)* [1973] 1 NSWLR 603 at 606, a case which, however, depended upon the specific wording of the statute under consideration.

[27] From these cases, it is for the court to determine whether taking into consideration the whole circumstances and situation, the discontinuance or withdrawal of the action by the plaintiff can safely be equated with defeat or an acknowledgement of likely defeat so as to justify that the plaintiffs be ordered to pay the defendant costs of the action.

[28] The court is entitled to take into consideration whether a plaintiff has acted reasonably in commencing the action and whether the action is *ex facie* certain to fail when it can be discerned without delving into the merits.

Analysis Of The Situation Of The Case

[29] Though the plaintiffs' action herein was commenced (on 21 October 2019) only about 11 days after the court made (on 9 October 2019) the declaration that the defendant's said appointment by the State Government of Sabah as the Director of Sabah State Water Department contravened s. 3 of the Sabah Water Supply Enactment 2003, the defendant continued to work and act as the Director of Sabah State Water Department.

[30] Even though that court did not declare in Originating Summons No. BKI-24-27/3-2019 that the appointment of the defendant as the Director to be null and void but the court has declared the appointment to be clearly in contravention of s. 3 of the Sabah Water Supply Enactment. It must mean something directing at the legality of the appointment of the defendant at least. It is a difficult proposition to swallow that an act declared to be contravening the law is still legal and lawful and means nothing.

[31] The fact is, the defendant continued to act as the Director of Sabah State Water Department, signing letter of intent as such Director shortlisting and selecting contractors to undertake project of Sabah State Water Department in the face of the court declaration. It is reasonable for any law-abiding citizens at least to feel disturbed.

[32] In the circumstances, I do not find it unreasonable for the plaintiffs as the procurer of the court's declaration in the previous action to commence the action herein on 21 October 2019.

[33] In respect of the submission of the defendant that the defendant had to continue to conduct himself as the Director of Sabah State Water Department as directed by the higher authority as the previous court declaration has not declared the defendant's appointment null and void and the defendant's stand as advised by his solicitor as to the effect of the contravention of s. 3 of Sabah Water Supply Enactment 2003, it is not necessary for me and I express no view thereto.

[34] No amount of words in the elaborated and abled submission of the counsel for the defendant can change the fact that it was after the plaintiff commenced the action herein on 21 October 2019, the Sabah State Public Service Commission issued a letter dated 30 October 2019 (exh. AS1 of encl. 12) to the defendant and appointed him as a Technical Adviser based in the State Secretary's Office with retrospective effect to 11 October 2019.

[35] By a further letter dated 1 November 2019 (exh. AS2 of encl. 12) of the Sabah State Public Service Commission, the defendant was immediately transferred to Sabah State Water Department to carry on duties as the Director.

[36] It is difficult not to believe that such moves were not in response to counter the plaintiffs' action herein as commenced. It ought to be made very clear that I am expressing no view at all in respect of this new appointment of the defendant.

[37] The result is that thenceforth, the defendant is acting under a new appointment.

[38] The new appointment of the defendant removes or changes the subject of the disputes in the action which is based on the previous appointment of defendant declared earlier by the court to be in contravention of s. 3 of Sabah Water Supply Enactment.

[39] There is no longer any issue of the defendant continuing to carry out the duties and exercise the powers of the Director of Sabah State Water Department under the earlier appointment which the court declared to be in contravening s. 3 of the Sabah Water Supply Enactment 2003 and which the plaintiff sought to restrain in this action.

[40] Any issues of the impropriety of the defendant continuing to act and exercise the power as the Director under the previous appointment become non issues. The basis of the plaintiffs' actions herein is to restrain the defendant from continuing to act and exercise power as the Director under the previous appointment and any cause of action in remedial thereto has been removed by the new appointment.

[41] In respect of the submission of counsel for the defendant that the plaintiffs should immediately withdraw the action after being made aware of the new appointment of the defendant when the plaintiffs were served with the defendant's affidavit in opposition (encl. 12) revealing the new appointment of the defendant instead of further filing the affidavit in reply (encl. 13) which necessitated the defendant to file further affidavit in reply (encl.17) and only decided to withdraw the action herein after the defendant's solicitors' notice of preliminary objection dated 8 January 2020 (encl. 18), I do not find the plaintiffs to have conducted unreasonably in the circumstances.

[42] It does not appear to be unreasonable for the plaintiffs to further file their affidavit in reply (encl. 13) to state their stand on the new appointment in relation to their action herein. The hearing of this action was then scheduled for 21 January 2020.

[43] The plaintiffs were entitled to reasonable time to appraise their position in making their decision in view of the change of circumstances due to the new appointment of the defendant as revealed by the defendant's affidavit in opposition (encl. 12).

[44] In the circumstances, it does not appear to me that there was undue or unreasonable delay on the part of the plaintiffs to convey to the defendant's solicitors, the plaintiffs' decision to withdraw or discontinue the action herein, which was before the said scheduled hearing date.

[45] Obviously, the defendant has no wish also for the action to proceed to full hearing or trial and thus, required the plaintiffs to withdraw and discontinue the action.

[46] The defendant's counsel contended that the plaintiffs should be ordered to pay the defendant, costs of this action as the plaintiffs' action herein is bound to fail on the following grounds:

(i) The court in the previous action in Originating Summons No: BKI-24-27/3-2019 did not declare that the defendant's appointment is null and void;

(ii) The injunction sought for by the plaintiffs in the action contravenes s. 29(2) of Government Proceedings Act 1956;

(iii) The new appointment of the defendant has rendered the plaintiffs' action academic;

(iv) The plaintiffs' action is barred by the doctrine of *res judicata*;

(v) The plaintiffs' action is an abuse of the process; and

(vi) The penalty for breaching s. 3 of the Sabah Water Supply Enactment is as provided in s. 66 therein and not by way of vacating the seat/office of the Director of the Sabah State Water Department.

[47] It is not appropriate for me to delve into the merits of the case of the respective parties as if conducting a full hearing of the action.

[48] However, if the defendant could establish that the plaintiffs' action is so plainly and obviously unsustainable and is certain to fail without the need for the court to delve into the merits of the case of the respective parties like trying the action and the defendant could also establish that by whole circumstances, the plaintiffs' withdrawal or discontinuance of this action really amounts to concession of defeat or an acknowledgement of likely defeat, it would be justifiable in the exercise of the discretion to order the plaintiffs to pay costs of the action.

[49] Suffice to say that, the defendant's counsel has failed in his submission to persuade me that the plaintiffs' action is so plainly and obviously unsustainable and is certain to fail.

[50] I am not persuaded that it is so plain and obvious that the mere declaration by the court that the defendant's appointment is in contravention of s. 3 of the Sabah Water Supply Enactment and short of declaring it null and void would have no legal effect at all so that the plaintiffs could not resort to the action to restrain the defendant in continuing acting as, carrying on the duties and exercising the powers of the Director of the Sabah State Water Department.

[51] In respect of s. 29(2) of Government Proceedings Act 1956, it is not that plain and obvious that when the defendant's appointment declared by the court to be in contravention of s. 3 of the Sabah Water Supply Enactment, the defendant could still claim "as an officer" of the State government thereunder and against him, injunction could not be granted. See: *Sabil Mulia (M) Sdn Bhd v. Pengarah Hospital Tengku Ampuan Rahimah & Ors* [2005] 2 CLJ 122 CA.

[52] In respect of the contention of counsel for the defendant that the new appointment of the defendant has rendered the plaintiffs' action herein academic and bound to fail, the new appointment of the defendant is a change of event brought about after the commencement of the action. The change of event was not brought by the plaintiffs. It is the very reason and cause which the plaintiffs have to withdraw or discontinue the action. I find it absurd that it could be used to contend that the plaintiffs' action based on the previous appointment of the defendant is plainly and obviously unsustainable.

[53] I am not persuaded by the submission by counsel for the defendant that it is plain and obvious that the plaintiffs' action herein to restrain the defendant to continue acting as, carrying on the duties and exercising the powers of the Director of Sabah State Water Department based on his previous appointment declared by the court to be in contravention of law is

barred by the doctrine of *res judicata* and is an abuse of the process of the court. See: *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; [1998] 1 MLJ 393 FC and *Pengarah Tanah dan Galian Negeri Pulau Pinang & Anor v. Ann Joo Steel Sdn Bhd & Another Appeal* [2018] 4 CLJ 171; [2017] 6 MLJ 397 (CA)

[54] In the premise, having regards to the whole circumstances and situation particularly the change of event by the new appointment of the defendant brought about after the plaintiffs commenced the action herein which renders the action academic, the decision by the plaintiffs to withdraw or discontinue the action cannot safely be equated with defeat or an acknowledgement of likely defeat of the plaintiffs' action.

[55] Further, plaintiffs appear to have commenced the action herein for public interest that the law is adhered to.

Conclusion And Pronouncement

[56] In the circumstances, it is unfair and unjust to penalise the plaintiffs to pay costs of the action.

[57] I therefore grant the plaintiffs leave to withdraw or discontinue this action and order that each party shall bear their own costs.